No. 15085.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TWENTIETH CENTURY DELIVERY SERVICE, INC., a corporation,

Appellant,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a corporation,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

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Jurisdiction.

The Plaintiff, St. Paul Fire and Marine Insurance Company, Inc. (Appellee here) commenced an action in the United States District Court for the Southern District of California, Central Division, and did file a First Amended Complaint alleging two causes of action against each of the Defendants, Trans-World Airlines, Inc., hereinafter referred to as TWA, Air Cargo, Inc., Twentieth Century Delivery Service, Inc., a corporation (Appellant here), hereinafter sometimes referred to as Twentieth Century, and Doe I, Doe II, Doe III and Doe IV.

Said Amended Complaint alleged diversity of citizenship as respects the Defendant TWA, Air Cargo, Inc. and Twentieth Century, and alleged a controversy involving damage in excess of the requisite jurisdictional amount.

This appeal is brought under Title 28, United States Code, Section 1291, as being within the usual appellate jurisdiction of this Court upon appeal from final judgments in actions at law.

Statement of the Case.

Plaintiff (Appellee) brought two separate causes of action under a First Amended Complaint. One cause was for breach of contract and the other for negligence in the carriage of goods. TWA, Air Cargo, Inc., Twentieth Century and Doe I, Doe II, Doe III and Doe IV were named as Defendants as respects each cause of action [Tr. p. 3]. Before judgment the actions were dismissed as to TWA, Air Cargo, Inc., and Doe I, Doe II, Doe III and Doe IV [Tr. pp. 39, 114].

In EACH of the causes of action the Plaintiff alleged that the Calnevar Company, hereinafter referred to as Calnevar, entered into a written contract with the Defendant TWA for the carriage of a certain prototype automatic coffee vending machine from St. Louis, Mo., to Los Angeles, California, and that TWA did transport said machine to Los Angeles, California [Tr. pp. 5-6]. Plaintiff further alleges that TWA did hand said machine to Twentieth Century at Los Angeles International Airport and direct its delivery to Calnevar Company, 1732-42 West Washington Boulevard, Los Angeles, California [Tr. p. 6].

Each of the causes of action allege that the Plaintiff had issued a property damage policy covering physical

damage to the coffee vending machine and that said policy provided for additional payment in the amount of 25% of the physical damage by and for the loss of use of the article so insured and that the Plaintiff paid $9,656.25 to Calnevar and became subrogated to this extent to the rights of Calnevar [Tr. p. 7].

The FIRST cause of action alleges that by reason of gross negligence of the Defendants the coffee vending machine was physically damaged to the extent of $7,725.00 [Tr. pp. 6-7].

The SECOND cause of action alleges that the Defendants delivered to Calnevar at Washington Boulevard, Los Angeles, California, the coffee vending machine in a damaged and broken condition and that the Defendants breached their contract and that the Plaintiff was thereby damaged to the extent of $9,656.25 [Tr. p. 8].

The Defendant Twentieth Century denied generally that the Plaintiff was damaged by reason of any negligence on the part of Twentieth Century or by a breach of contract [Tr. pp. 19-22].

Twentieth Century further pleaded in defense that the coffee vending machine was shipped pursuant to a uniform Airbill which provided that said machine was accepted for transportation subject to the governing classifications and tariffs in effect as of the date of said Bill and that the declared value of said machine was agreed and understood to be not more than the value stated in the governing tariffs for each pound upon which charges were assessed [Tr. pp. 23-26].

Twentieth Century further pleaded for defense that the governing tariff provided that the involved shipment was deemed to have a declared value of 50¢ per pound

but not less than $50, unless a higher value was declared on the Airbill at the time of receipt of shipment from the shipper [Tr. p. 27]. Twentieth Century further pleaded that Rule 3.1(c) of the Airfreight Rules Tariff No. 1-A provided that the Airbill and tariffs applicable to the shipment should apply at all times when the shipment was being handled by or for the carrier including air transportation by the carrier and pick-up, delivery and other ground services rendered by the carrier or any other person performing for the carrier such pick-up, delivery or ground services in connection with the shipment [Tr. p. 26]. Twentieth Century further alleged that at the time and place of damage Twentieth Century was handling the coffee vending machine for TWA and was delivering and performing ground services in connection with the shipment of said machine for TWA [Tr. pp. 26-27].

Upon these issues the case came on for trial.

Summary of Facts.

By stipulation the evidence establishes that on July 20, 1954, Calnevar entered into a contract with TWA at St. Louis, Mo., for the transportation from St. Louis, Mo., to 1732-42 West Washington Blvd., Los Angeles, California, of one prototype automatic coffee vending machine and one carton of parts. Said contract was evidenced by Airbill No. 933916 issued by TWA [Ex. 2; Tr. p. 43]. That said Airbill did expressly provide for delivery of said machine to 1732-42 West Washington Blvd., Los Angeles, California and for charges therefor. That said Airbill provided that it was agreed and understood that the declared value was to be not more than the value stated in the governing tariffs for each pound

upon which charge was assessed unless a higher value was declared [Ex. 2].

Airbill No. 933916 did not provide for any higher declared value than that provided by the governing tariffs [Ex. 2, Tr. p. 43].

By stipulation the evidence establishes that at the time of this shipment there was in existence a contract in writing by and between TWA and the Defendant Twentieth Century wherein and whereby Twentieth Century agreed to perform services of pick-up, delivery and other ground services incidental to the transportation of air freight by TWA [Ex. 4; Tr. p. 42, para. 6, p. 44]. That Twentieth Century did transport by motor truck said automatic coffee vending machine to 1732-42 West Washington Boulevard, Los Angeles, California, and did deliver the same to Calnevar [Tr. p. 105]. That on July 12, 1954, TWA delivered said machine to Calnevar on Washington Boulevard, Los Angeles, California, and Calnevar did receipt for delivery of said machine on a copy of TWA Airbill No. 933916 [Ex. 2; Tr. p. 108]. That Calnevar, upon delivery of the machine, contracted and made claim against TWA in connection with alleged damage and did call a TWA inspector to inspect said damage [Tr. p. 57]. That the Plaintiff introduced evidence to the effect that the cost of repairing the physical damage to said machine would involve 700 work hours at a maximum cost of $8.00 per hour, or $5600.00 plus a maximum cost of supervision and expediting of $865.00, for a total of $6,468.00. Plaintiff also introduced evidence that if overtime were used in various ways that the cost of repair of the physical damage would be either $6,865.00, $7,345.00, $7,400.00, $7,-725.00, or $7,920.00 [Ex. A, Tr. p. 92].

That the Plaintiff St. Paul Fire and Marine Insurance Company was subrogated to whatever rights in the premises belonged to Calnevar Company [Tr. p. 44]. That the Plaintiff St. Paul Fire and Marine Insurance Company paid to Calnevar the sum of $9,625.25 [Tr. p. 91].

That by stipulation the evidence establishes that the Airfreight Rules Tariff No. 1-A in effect at the time of this shipment provided as follows:

Rule No. 3.1

"(a) The shipper shall have the duty to prepare and present a non-negotiable Airbill with each shipment tendered for transportation subject to this Tariff and tariffs governed hereby. If the shipper shall fail to present such Airbill to the carrier at the time of tendering the shipment, the carrier may accept such shipment if accompanied by a non-negotiable shipping document, or memorandum. No Airbill or other shipping document or memorandum issued or accepted by a carrier shall be negotiable, irrespective of the wording of such document or memorandum. Each such shipment, irrespective of the form of shipping document or memorandum accepted by the carrier in connection therewith, shall be subject to the carrier's tariffs in effect on the date of acceptance of such shipment by the carrier. * * *"

Rule No. 3.1

"(b) The Airbill, and the tariffs applicable to the shipment shall inure to the benefit of and be binding upon the shipper and consignee and the carriers by whom transportation is undertaken between the origin and destination, including destination on reconsignment or return of the shipment; and shall inure also to the benefit of any other person, firm or corporation performing for the carrier pick-up,

delivery, or other ground service in connection with the shipment."

Rule No. 3.1

"(c) The Airbill, and the tariffs applicable to the shipment shall apply at all times when the shipment is being handled by or for the carrier, including air transportation by the carrier and pick-up, delivery and other ground services rendered by the carrier or any other person performing for the carrier, such pick-up, delivery or ground services in connection with the shipment."

Rule No. 4.3

"(a) 1. A shipment shall be deemed to have a declared value of $0.50 per pound (but not less than $50.00) unless a higher value is declared on the Airbill at the time of receipt of the shipment from the shipper. * * *"

Rule No. 4.3

"3. An additional transportation charge of $0.10 shall be required for each $100.00 (or fraction thereof) by which the value declared on the Airbill at the time of receipt of the shipment from the shipper, exceeds $0.50 per pound or $50.00 (whichever is higher)."

Rule No. 4.3

"4. The weight used to determine the declared value of a shipment shall be the same as that which is used to determine the transportation charge for such shipment" [Ex. 3, Tr. p. 43].

That by stipulation the evidence establishes that on January 7, 1955, TWA tendered to the Plaintiff the sum of $122.50 in full settlement of the Plaintiff's subrogation and that said check was refused and returned to TWA on January 20, 1955 [Ex. 1, Tr. pp. 42-43].

Assignments of Error.

The Appellant has heretofore filed with this Court the following Statements of Points:

I.

"The following Findings of Fact are not supported by the evidence.

"Finding No. IX. On or about July 12, 1954, Trans World Airlines, Inc., did hand said coffee vending machine in good order and condition to defendant Twentieth Century Delivery Service, Inc., for delivery to Calnevar at Los Angeles International Airport [Tr. p. 117].

"Finding No. XI. That by reason of the negligence of Twentieth Century Delivery Service, Inc., acting through its servant, said coffee maker and the wooden package in which it was housed were damaged [Tr. p. 117].

"Indicated portion of Finding No. XIII. That the sum of $1,931.25 was the reasonable value of the loss of use of said coffee maker [Tr. p. 118].

"The indicated portion of Finding No. XVIII. That defendant Twentieth Century Delivery Service, Inc., * * * and was not covered or encompassed within or by the said air freight tariff of Trans World Airlines, Inc. [Tr. p. 118].

"Finding No. XIX. That there is no evidence that the Calnevar Company entered into any agreement with defendant Twentieth Century Delivery Service, Inc., respecting the value of said automatic coffee maker [Tr. p. 118].

II.

"The following Conclusions of Law are not supported by the evidence and are contrary to law:

"Conclusion No. I. That the automatic coffee vending machine owned by Calnevar Company and insured by plaintiff St. Paul Fire and Marine Insurance Company was damaged through the negligence of defendant Twentieth Century Delivery Service, Inc. [Tr. p. 118].

"Conclusion No. II. That defendant Twentieth Century Delivery Service, Inc., cannot limit its liability for said damage by any provision contained in air freight tariff of Trans World Airlines, Inc. [Tr. p. 118].

"Conclusion No. III. That the damage reasonably sustained by Calnevar Company was in the sum of $9,656.25 [Tr. p. 118].

"Conclusion No. V. That plaintiff is entitled to judgment against Twentieth Century Delivery Service, Inc., in the sum of $9,656.25" [Tr. p. 119].

The Appellant does hereby withdraw the following Statements of Points and Assignments of Error:

"Finding No. XI. That by reason of the negligence of Twentieth Century Delivery Service, Inc., acting through its servant, said coffee maker and the wooden package in which it was housed were damaged.

"Conclusion No. I. That the automatic coffee vending machine owned by Calnevar Company and insured by plaintiff St. Paul Fire and Marine Insurance Company was damaged through the negligence of defendant Twentieth Century Delivery Service, Inc."

ARGUMENT.

The Appellant submits that the Trial Court erred in holding:

(1) That the Defendant Twentieth Century was not entitled to the benefit of the declared valuation pursuant to the Airbill and Airfreight Rules Tariff.

(2) That Calnevar, and thereby the Plaintiff, suffered loss in the amount of $9,625.25 by reason of damage to the coffee vending machine.

I.

That the Defendant Twentieth Century Was Entitled to the Benefit of a Declared Value Pursuant to the Airbill and Airfreight Rules Tariff.

(a) The Provisions of the Airfreight Rules Tariff and the Airbill Clearly Direct That Twentieth Century Was and Is Entitled to the Benefit of the Declared Valuation Provisions of the Airfreight Rules Tariff and Airbill.

The machine was shipped pursuant to Airbill No. 933961, which Airbill provided for delivery to 1732-42 West Washington Blvd., Los Angeles, California [Ex. 2]. By the terms of said Airbill the declared value was agreed and understood to be not more than the value stated in the governing tariffs unless a higher value was declared [Ex. 2].

No higher value was declared [Tr. p. 43].

The governing tariff of TWA provided as follows:

> "Each *shipment,* irrespective of the form of shipping document or memorandum accepted by the carrier in connection therewith, shall be subject to the carrier's tariffs in effect on the date of acceptance of such *shipment* by the carrier."
>
> Rule No. 3.1(a) [Ex. 2].

"The Airbill, and the tariffs applicable to the shipment shall inure to the benefit of and be binding upon the shipper and consignee and the carriers by whom transportation is undertaken between the origin and destination, including destination on reconsignment or return of the shipment; and shall inure also to the benefit of *any other person, firm or corporation* performing for the carrier pick-up, *delivery, or other ground service* in connection with the *shipment.*"

Rule No. 3.1(b) [Ex. 2].

"The Airbill, and the tariffs applicable to the *shipment* shall apply at all times when the shipment is being *handled* by or for the carrier, including air transportation by the carrier and pick-up, *delivery and other ground services* rendered by the carrier or *any other person* performing for the carrier, such pickup, *delivery* or *ground services* in connection with the shipment."

Rule No. 3.1(c) [Ex. 2].

It is to be noted that the general Section 3.1(a) refers to *shipment* and not to the character of the parties involved in the shipment transaction [Ex. 2].

The punctuation of Section 3.1(b) is compelling in its construction. The Section is divided by a semi-colon. The first portion specifically refers to shipper, consignee and carriers. The portion following the semi-colon provides that the Airbill and tariffs applicable to the *shipment* shall inure *also* to the benefit of *any other person, firm or corporation* performing for the carrier pick-up, *delivery* or *other ground services* in connection with the shipment. The necessary deduction is that the provisions of the Airbill and tariffs inure to the benefit of others than shippers, consignees or carriers [Ex. 2].

Rule 3.1(c) provides that the Airbill and tariffs applicable to the *shipment* shall apply at all times while the shipment is being *handled* by or *for* the carrier including * * * *delivery and other ground services* rendered by * * * *any other person* performing such * * * delivery or ground services in connection with the shipment. By this section the only qualification set forth for the application of the benefit of the Airbill and tariffs to the shipment is that at the particular point and time in shipment that the shipment was being handled by "any other person."

The clear and unambiguous intent from the above quoted rules would seem to lead to only one conclusion and that is that the provisions of the Airbill and tariff apply to the shipment and that the benefit of such tariffs are specifically intended to apply to other than the shipper, consignee or carrier and more specifically to "any other person" performing delivery or other ground services.

The undisputed evidence establishes that Twentieth Century was in the process of making a delivery at the direction of TWA to the point of destination set forth in the Airbill at the time the alleged damage occurred [Tr. pp. 106-107].

The shipping weight of the involved articles was 245 pounds. Charges were assessed upon this weight. The governing tariff established the declared value at $0.50 per pound [Rule No. 4.3; Ex. 3], or the sum of $122.50.

The declared value pursuant to the tariff was tendered to the Plaintiff and refused [Para. 5 of Stip., Ex. 1, Tr. p. 42].

(b) Does the Law Prevent the Application of the Clear Provisions of the Airfreight Tariff Rules and Airbill to This Shipment?

(1) The Following Analogous Cases Establish and Support the Legal Necessity of the Application of the Valuation Provisions of the Tariff and Airbill to the Involved Shipment.

The Courts have consistently held that the benefit of the bills of lading involving interstate commerce and subject to inter-state commerce regulations apply to the transportation of the article from inception to destination, and not to the initial carrier only.

In the case of *Texas & Pacific Railway Co., et al. v. Leatherwood* (1919), 250 U. S. 478, 63 L. Ed. 1096, 39 S. Ct. 517, the Court had for its consideration the question of whether the provisions requiring suit to be brought within six months contained in the initial carrier's bill of lading inured to the benefit of other carriers. The case was transferred from the Texas Court to the Supreme Court of the United States and the Court reversed the Texas judgment and stated as follows:

> "The bill of lading given by the initial carrier embodies the contract for transportation from point of origin to destination and its terms with respect to conditions of liability are binding upon the shipper and upon all connecting carriers just as a rate property filed by the initial carrier is binding upon them."

To the same effect see:

> *Lyon v. Canadian Pacific Railway Co.,* 163 N. E. 180, 60 A. L. R. 1247.

In the case of *Western Transit Co. v. A. C. Leslie & Co.,* 242 U. S. 448, 61 L. Ed. 423, damage occurred to

certain copper ingots while stored in a warehouse awaiting further shipping directions. The carrier asserted a declared value based upon the bill of lading and the tariffs filed with the I. C. C. The Supreme Court reversed the Court of the State of New York, which had held the carrier responsible on the basis that warehousing did not carry with it the benefit of the declared valuation. The Supreme Court of the United States stated the rule as follows:

> "The release valuation clause in an inter-state bill of lading when based upon a difference in freight rates is valid. (Citing cases.) The limitation of such liability by means of such valuation contained in the bill of lading continues, although the service of carrying has been completed and the goods are being held by the carriers strictly as a warehouseman. (Citing cases.) The provisions of the bill of lading govern even where the goods are allowed to remain in the carrier's warehouse after giving receipt therefor and payment of freight. The carrier and the shipper can make no alteration of the terms upon which goods are held under a tariff, until there has been an actual delivery of the goods to the consignee."

In the case of *Georgia, Florida & Alabama Railroad Co. v. Blish Milling Co.,* 231 U. S. 190, 60 L. Ed. 948, the issue involved was whether the delivering carrier was entitled to the benefit of the provisions of the bill of lading of the original carrier in connection with a notice of claim. The Court stated the rule as follows:

> "The connecting carrier is not relieved from liability by the Carmack Amendment, but the bill of lading required to be issued by the initial carrier upon an inter-state shipment governs the entire transportation and thus fixes the obligation of all partici-

pating carriers to the extent that the terms of the bill of lading are equitable and valid. The liability of any carrier over the route in which the articles were routed for loss or damage is that imposed by the Act as measured by the original contract of shipment, so far as it is valid under the Act. (Citing cases) * * *

"There is, however, a further and controlling consideration. We are dealing with a clause in a bill of lading issued by the initial carrier. The Statute casts upon the initial carrier the responsibility with respect to the entire transportation. The aim was to establish unity of the responsibility (Citing cases) and the words of the Statute are comprehensive enough to embrace responsibility for all losses resulting from a failure to discharge a carrier's duty as to any part of the agreed transportation, which, as defined in the Federal Act, includes delivery. It is not to be doubted that if, in the case of an interstate shipment under a through bill of lading, the terminal carrier makes misdelivery, the initial carrier is liable; and when it inserts in its bill of lading a provision requiring reasonable notice and claim in case of failure to make delivery, the fair meaning of the stipulation is that it includes all cases of such failure, as well as those due to misdelivery as those due to the loss of goods. That the provision in question is not to be construed in one way with respect to the initial carrier and in one way with respect to the terminal carrier. As we have said the latter takes the goods under the bill of lading issued by the initial carrier and its obligations are measured by the terms. (Citing cases.)"

In the case of *Cleveland, Cincinnati, Chicago & St. Louis Railroad Co. v. Dettlebach,* 239 U. S. 588, 60 L. Ed. 453, the action was by Dettlebach against the railway

company for market value of certain goods shipped in interstate commerce, lost through the negligence of the railway company while in its possession as warehouseman at the place of destination. The goods were being shipped under description of household goods over the Chicago, Burlington & Quincy Railway and connecting lines consigned to his wife in Cleveland. Transportation was arranged under terms of bill of lading prepared in form approved by the ICC which contained a provision, "That every service hereunder shall be subject to all of the conditions whether printed or written herein contained, including conditions on the back hereof in which are agreed to by the shipper and accepted for himself and his assigns." Among the printed conditions on the back of the form were clauses providing for value to be determined at the place and time of shipment and then on the face of the bill was declaration consigned by the plaintiffs' agent, "I hereby declare that the valuation of the property shipped under this bill of lading does not exceed $10.00 per hundred weight." Judgment in the lower courts for the plaintiff brought on an appeal to this Court and judgment reversed, cause remanded for further proceedings in accordance with the opinion.

> "It is no longer open to question that if the loss had occurred in the course of transportation upon the defendant's line, the limitation of liability agreed upon with the initial carrier, as this was, for the purpose of securing a lower of two rates of freight, would have been binding on plaintiff in view of this Carmack Amendment. (Citing cases.) The question is, whether the limitation of liability may have been deemed to have spent its force upon the completion of the carrier's service as such, or must be held to control, also, during the ensuing relation of warehouseman."

The provision that we have quoted from the contract is to the effect that "every service to be performed hereunder" is subject to the conditions contained in it. One of these conditions is, in substance, that where a valuation has been agreed upon between the shippers and the carriers such value shall be the maximum amount for which any carrier may be held liable whether or not the loss occurs from negligence, and that this, as a mere matter of construction, applies to the relation of warehouseman as well as the strict relation of carrier, is manifest from the further provision that the property not removed within 48 hours after notice of arrival may be kept "subject to a reasonable charge for storage and to carriers responsibility as warehousemen only." Thus "any language for loss or damage for which any carrier is liable" includes not merely the responsibility of the carrier, strictly so-called, but carriers responsibility as warehouseman also.

And this is quite in line with the letter and policy of the Commerce Act and especially with the amendment * * * known as the Hepburn Act * * * which enlarged the definition of the term "transportation" (this under the original Act included merely "all instruments of shipments are carriage"). So as to include cars and other vehicles and all instrumentalities and facilities of shipment or carriage irrespective of ownership or of any contract express or implied for the use thereof *and all services in connection with* the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and hauling of property transported and it shall be the duty of every carrier, subject to the provisions of this Act, to provide and furnish such transportation upon reasonable request therefor and establish through routes and just and reasonable rates applicable thereto. * * *

From this and other provisions of the Hepburn Act, it is evident that Congress recognized that the duty of the carriers to the public included a performance of a variety of services, that, according to the theory of the common law, were separable from the carrier's service as carrier and, in order to prevent overcharges and discriminations from being made into the pretext of performing such additional services, it enacted that insofar as interstate carriers by rail were concerned, the entire body of such services should be included together under the single term "transportation" and subjected to the provisions of the Act respecting reasonable rates and the like. The recommendation of the Interstate Commerce Commission for the adoption of the uniform bill of lading was, of course, made in view of this legislation and while not intended to be and not in law binding upon carriers, it is entitled to some weight. * * * We conclude that, under the provisions of the Hepburn Act and the terms of the bill of lading, the evaluation placed on the property here in question, must be held to apply to the defendant's responsibility as warehouseman.

The same rule as enunciated in the bill of lading cases as applied to railroads was also applied in the case of *A. M. Collins & Co. v. Panama Railway Company,* 197 F. 2d 893, 97 L. Ed. 677, 344 U. S. 875, 73 S. Ct. 168. An electrical freezing unit was shipped from New Jersey to the Canal Zone pursuant to bill of lading. The unit went by steamship to the port of Christobal, Panama Republic. The services of the Panama Railway Company were engaged to unload the freezing unit. The freezing unit, while being removed from the ship to the dock, was dropped resulting in damage. The owner of the unit sued the Panama Railway Company, who by its answer

pleaded the provisions of the ocean bill of lading limiting recovery under a declared value to $500.00. The Court held that the limitation was binding under the negotiable bill of lading and stated as follows:

> "It is conceded as it must be that the contract of carriage under the bill of lading was not fulfilled until the cargo described was delivered on dock at Christobal. The controlling feature of the case is not as Appellants contend who are the formal parties to the bill of lading. What is controlling are the terms, purpose and effect of the Bill of Lading as applied to the facts. The unloading of the shipment was the obligation of the carrier. In the absence of the different agreement with persons not parties thereto, the terms of the bill of lading controlled all steps of the transportation, including, of course, the discharge of the shipment. Stevedore was not a meddler, nor did it inflict intentional harm. It was an Agent selected by the carrier to carry out the carrier's obligation to safely deliver and discharge the cargo as required by its contract with the shipper. The negligent injury and damage arose in the course of this very performance of the carrier's obligation. It is well stated by the trial court that the carrier would engage such services must have been contemplated by the parties. The situation is substantially the same as if carrier had shipped by another vessel as authorized by the bill of lading. A stevedore in so unloading, in every practical sense, does so by virtue of the bill of lading, and though not strictly speaking a party thereto, is, while liable as an agent for his own negligence, at the same time entitled to claim the limitation of liability provided by the bill of lading to the furtherance of the terms of which its operations are directed. * * *

"All parties concerned with the negotiable ocean bill of lading, the carrier, the shipper, the consignee, the discounting bank and the insurance underwriter, are alike interested not so much in the method as in the *result* to be achieved, the delivery of the cargo at the port of destination in good condition. The bill of lading contract with the carrier covers that completed service from the time of loading of the goods to their discharge from the ship. The extent of liability of the carrier and of other persons performing that service under the carrier does not depend upon the means adopted but is governed by the contract covering the entire service.

"The limitation of liability of the carrier under the Carriage of Goods by Sea Act is not intended to be personal, but unless otherwise agreed, extends to any other agency by means of which the carrier performs its contract and transportation and delivery. As well stated in 2 RESTATEMENT OF AGENCY, Section 347: 'An Agent who is acting in pursuance of his authority has such immunities of the principle as are not personal to the principle.' (Citing cases.)"

In the case of *Northern Fur Co., Inc. v. Minneapolis, St. Paul & S. M. M. Ry. Co.,* 224 F. 2d 181, the issue involved was whether the provisions of a railway express agency receipt for rail transportation and air express in connection with a release valuation was valid. The shipment was lost while in the hands of one of the connecting railway carriers referred to as Soo. The express receipt provided as follows: "The provisions of this receipt shall inure to the benefit of and be binding upon the consignor, the consignee and all carriers handling this shipment and shall apply to any reassignment or return thereof." The Court held the release valuation binding and stated:

"A railroad which under the circumstances in this case is transporting a car in which an express shipment is in the physical custody of employees of the express company, is not only a carrier, but is a 'Carrier Handling' said shipment as defined in clause 1 of the receipt * * *. We find it unnecessary to decide whether the plaintiffs are correct in that contention that the railroad express is an independent contractor and not agent for Soo, even if the plaintiffs are right in so urging, the facts would not conflict with our reasoning and the result which we reach."

(2) The Declared Valuation Provisions of an Air Tariff Are Valid and Enforcible.

Lichten v. Eastern Airlines, 189 F. 2d 939, 25 A. L. R. 2d 1337, 1951 U. S. Av. 310.

S. Toepfer v. Braniff Airways, Inc., 135 Fed. Supp. 671, 691. In this case the court upheld the declared value of $100 against the plaintiff's claim of approximately $90,000.00 for lost jewelry and stated as follows, on page 672:

"There is no genuine issue as to any material fact. The tariff filed by the defendant in the office of the Civil Aeronautics Board pursuant to the provisions of the Civil Aeronautics Act * * * became a part of the contract of transportation. (Citing cases.) Since no higher value was declared and since no fee for additional coverage was paid, the plaintiff can recover no more than the $100.00 provided in the tariff and tendered by the defendant which would be true even if the loss of the baggage was occasioned by the negligence of the carrier. (Citing cases.)"

See also:

Wilkes v. Braniff Airways, Inc., 288 P. 2d 377.

(3) The Law Recognizes That the Rules Applicable to Rail and Express Companies as Provided for by Tariffs Filed With the Interstate Commerce Commission Are Analogous to Air Tariff Rules and That the Air Tariff Rules Should Be Applied, Other Things Being Equal, in the Same Manner.

In the case of *Wilkes v. Braniff Airways, Inc., supra,* the court sustained the air carrier's contention of the validity of the declared valuation and stated as follows:

> "Carriers by rail and express companies are required to file their rate schedules at the Interstate Commerce Commission while air carriers file their rules and schedules with the Civil Aeronautics Board. No reason has been suggested why the same rules as to limited liability should not apply equally to each class of interstate carrier."

(c) By the Use of the Term "Any Other Person" in the Tariff Rules It Was Intended to Designate a Broad and Unrestricted Classification of Parties Qualified Only by the Condition That Said Parties Be Performing the Specified Services Which Include Delivery and Ground Services.

In the case of *City of Buffalo v. Hannah Furnace Corp.,* 305 N. Y. 369, 113 N. E. 2d 520, the Court had for consideration the interpretation of the meaning of the words "any other person." The lower Court held that such a wording did not include the employee of the state or government. The Appellate Court reversed the lower Court and stated:

> "The Courts should not strain to limit the availability of such an important remedy by narrowly circumscribing the reach of words so inclusive as

> 'any other person' *and its very generality bespeaks a legislative design that the provision be accorded a very broad content.*" (Emphasis added.)

In the case of *Escrow Inc. v. Berle of Haworth,* 36 N. J. Supp. 469, 116 A. 2d 526, the Court had for its consideration the interpretation of the words "any other persons" and stated:

> "It should be noted that the said statute states '* * * Provided that no higher price nor better terms shall then be bid for said property by any other person in which case the sale is to be made to the highest bidder. * * *' Obviously the sale under the statute was apparently conducted on the basis of competitive bidding. No person offering a higher price or better terms can be deprived of the right to bid. 'Any other person' cannot mean any other established churches as contended by the municipality."

In the case of *State v. Small,* 111 A. 2d 201, the Court had for consideration a statute that provided "no licensee, sales agent or any other person shall sell or give away, etc." It was contended that the general phrase "nor any other person" should be restricted to the specific words that preceded it such as licensees and sales agents. The Court refused to apply the limited interpretation sought.

See also to the same effect:

> *State v. Campbell,* 76 Iowa 122, 40 N. W. 100;
>
> *Commonwealth Title Ins. & Trust v. Ellis,* 192 Penn. St. 321, 43 Atl. 1034.

The appellant herein asserts that, by the clear terms of Rule No. 3.1 (a), (b) and (c) of the Airfreight Rules Tariff, Twentieth Century clearly was within the classi-

fication of "any other person." By the authority above quoted, if there can be any question as to Twentieth Century being within such a classification, the above authorities clearly indicate that the words themselves are broad in character and that their use is indicative that they are not intended to be qualified by other classifications used with them.

(d) Twentieth Century Was "Handling" the Shipment and Performing Delivery at the Time of the Alleged Damage for TWA.

Without belaboring either the evidence in the record or the law, the appellant asserts that the evidence amply establishes that at the time of the alleged injury Twentieth Century was *handling the shipment* and cites the following cases:

International Harvester Co. v. National Surety Co., 44 F. 2d 746, 75 L. Ed. 788, 51 S. Ct. 179, 282 U. S. 895;

Employers Mutual Liability Ins. Co. of Wis. v. Lloyds, 80 Fed. Supp. 343 (Affirmed at 177 F. 2d 249).

In the case of *Northern Fur Co., Inc. v. Minneapolis, St. Paul & S. M. M. Ry. Co.* (*supra*), the case involved a shipment in the hands of a connecting carrier and the Court stated as follows:

> "A railroad which, under the circumstances in this case, in transporting a car in which an express shipment is in the physical custody of the employees of the express company, is not only a carrier, but is a 'Carrier Handling' said shipment as defined in Clause 1 of the receipt * * *."

(e) Where a Party Contracts to Perform, as to the Contractee the Duty of Performance Remains That of the Contractor and the One Performing for the Contractor as Respects the Contractee Is Acting for the Contractor Even in the Extreme Instances Where the Performing Party Is an Independent Contractor as Respects the Agreement Between the Contractor and the Performing Party.

Pacific Fire Ins. Co. v. Keany Boiler & Mfg. Co., 277 N. W. 226 (Minn.);

H. W. Van Slyke Warehouse Co. v. Vilter Mfg. Co., 291 Pac. 1103 (Wash.);

Schulte v. United Electric Co., 66 N. J. Law 435, 53 Atl. 204;

Marion A. Davidson v. Madson Corp., 257 N. Y. 120, 177 N. E. 393, 76 A. L. R. 1103;

Huckins Hotel Co. v. Clampett, 224 Pac. 945 (Okl.).

In the case of *Northern Fur Co., Inc. v. Minneapolis, St. Paul & S. M. M. Ry. Co. (supra),* the Court stated as follows:

> "We find it unnecessary to decide whether the Plaintiffs are correct in that contention that the railroad express is an independent contractor and not agent for Soo, even if the Plaintiffs are right in so urging, the facts would not conflict with our reasoning and the result which we reached."

The result reached in the above case was that the release valuation inured to the benefit of the connecting carrier, Soo.

II.

Does the Evidence Support the Finding That Calnevar, and Thereby the Plaintiff, Suffered Loss in the Amount of $9,625.25 by Reason of Damage to the Coffee Vending Machine?

(a) **"Where the Property Has Not Been Wholly Destroyed the Proper Measure of Damages for Its Partial Destruction Is the Difference Between Its Value Immediately Before and Immediately After the Injury But if It Can Be Repaired for a Lesser Sum the Cost of Repairing Thereupon Becomes a Measure of Damage."**

14 Cal. Jur. 2d 788, Sec. 156.

The rule of damages permits the use of the cost of repair as a measure of damage provided such repair cost does not exceed the value difference before and after, or in any event the total value of the property.

Lane v. Spurgeon, 100 Cal. App. 2d 460, 223 P. 2d 889.

The evidence establishes that the prototype which was damaged was hand made [Tr. p. 51]. That the original cost thereof was $75,000.00 to $100,000.00 [Tr. p. 51], and that the machine was a prototype [Tr. p. 47], and that prior to the date of damage tests were completed and finalized [Tr. pp. 49-50]. The machine had been shown in St. Louis, Mo. [Tr. p. 51]. There were tentative arrangements for the sale of the machine and the patent rights [Tr. p. 63]. Bids from subcontractors for the manufacture of the parts had been obtained in bushel baskets [Tr. pp. 69, 70, 71]. That a machine made from the drawings and under production of one hundred units would cost, by Mr. Sloier's testimony, $500.00 [Tr. p. 67]. Based upon Mr. Graham's report,

in volume production the machine could be made for $600.00 to $700.00 [Ex. A]. Mr. Sloier equivocally testified as to certain asserted uses which were required of the prototype machine, which the appellant asserts, by the nature of the testimony and the evidence adduced, amounts to only speculation.

> "Damages which are purely speculative, fanciful or imaginative cannot be recovered."
>
> *Myers v. Nolan,* 18 Cal. App. 2d 319, 63 P. 2d 1206.

An analysis of all the evidence pertaining to the nature of the hand made prototype which was alleged to be damaged, the appellant submits, forces a conclusion that this particular coffee vending machine had expended its usefulness as a prototype and that the value of such machine could not exceed its value as a piece of merchandise consisting of a coffee dispensing machine.

The Appellant submits that the evidence in the record establishes that the maximum value of such damaged machine, in any event, was $700.00.

(b) The Evidence Establishes That the Amount Paid by the St. Paul Fire and Marine Insurance Co. for the Physical Damage Was Arbitrary and Speculative.

The St. Paul Fire and Marine Insurance Co. made payment for physical damage in the amount of $7,725.00 on the basis of Mr. Graham's report [Tr. pp. 94, 99]. The report of Mr. Graham predicates the figure of $7,725.00 upon a formula of work hours which involves the use of overtime and double overtime [Ex. A]. Mr. Graham's report further sets forth that even with the use of some overtime that the estimate of the cost of repair could be as low as $6,865.00 [Ex. A]. The record

fails to disclose at any point the justification for overtime or that overtime was actually used in the repair of the machine. Mr. Graham's report further sets forth an estimate of 700 man hours for repairs of the machine at a maximum straight rate of $8.00 per hour, which amounts to $5,600.00, plus a maximum estimate of $865.00 for supervision and expediting, making a total of $6,465.00 as the cost of repairs if no overtime or double overtime were involved [Ex. A].

The method used by the St. Paul Fire and Marine Insurance Co. for the purpose of arriving at the amount they paid Calnevar for the physical damage is such that the appellant asserts that the inference is justified that the amount of damage so arrived at as to the cost of repairs is speculative and does not support the finding of fact as to the amount of physical loss or as to a loss in any other amount.

(c) The Record Fails to Establish That Calnevar Suffered Any Damage by Loss of Use, or Any Measure of Any Such Damage.

The witness Donald Clark, adjuster for the St. Paul Fire and Marine Insurance Co., testified as follows with respect to the payment in the sum of $1931.25 by the St. Paul Fire and Marine Insurance Co. for loss of use of the coffee vending machine:

> "Q. You elected to pay the $7,725, as set forth in Graham's report; that is correct? A. That is correct.
>
> Q. And the expediting you speak of, that is in addition to the amount that was ascertained by Graham's report for repairs, isn't it? A. That is correct, and I—

Q. And that is an arbitrary figure that is based on an equation set up in your insurance contract, isn't it? A. That is correct.

Q. And there was no investigation made by you whatsoever as to what the value of the loss of use of the machine was, was there? A. It was predetermined by the policy contract." [Tr. p. 99.]

"Q. Referring to the $1931.25 item, Mr. Clark, is it true that that item was paid purely on the basis of a formula set up in the policy? A. It was paid in accordance with the agreed conditions of that policy, that the company would do that; that in the event that the loss was X-dollars, it would pay 25 per cent above that X-dollars.

Q. And concerning the $1931.25 item, so far as you know, no further investigation was made as to the factual basis for the loss of use applying to that item? A. It was contractual in the policy.

Q. Contractual only? A. Correct." [Tr. pp. 100-101.]

The record fails to establish any other formula for the ascertainment of the damages by loss of use or that any loss of use actually occurred. The arbitrary use of a percentage of the insurance payment for physical loss as a measure of damages for loss of use is not supported in the record or in business experience as a factual formula for such measure and that is especially true in this instance where the insurance payment for the physical loss arbitrarily, without apparent justification, included payment of overtime and double overtime so that the measure of loss of use became a pawn subject to the whim or fancy of the generosity of the insurance company.

"Profits are not considered as an element of damage if purely speculative or conjectural, or if measured by an indefinite or fanciful conception as to what they would have been had there been no breach of contract."

32 A. L. R. 121;

Calif. Civ. Code, Secs. 3301, 3333.

"Generally, no recovery can be had for loss of the profits that might have resulted from the manufacture of raw material into other articles, either in an action for breach of a contract to furnish such material or in an action for its negligent destruction, since such profits are too remote and speculative to serve as the basis for an award of damages."

15 Am. Jur., p. 573, Sec. 156.

"As a general rule, the expected profits of a mercantile business are too remote, speculative, and uncertain to sustain a judgment for their loss. * * * According to the weight of authority, however, a recovery may be had for such losses where they are reasonably certain in character and are the proximate result of either tort or a breach of contract. * * * The proof must pass the realm of conjecture, speculation, or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn.

"To come within the rule, it must be made to appear that the business which is claimed to have been interrupted was an established one which had been successfully conducted for such a length of time and had such a trade established that the profits thereof are reasonably ascertainable. The prospective profits of a new business or enterprise are generally

regarded as being too remote, contingent, and speculative to meet the legal standard of reasonable certainty applicable in determining the elements of recoverable damages in an action for breach of a contract or for a tort. No recovery can be had for damages to the good will or loss of trade of a new and unestablished business, since it can have no good will or trade to lose. * * *"

15 Am. Jur., Sec. 157, pp. 573, 574, 575.

Conclusion.

The evidence and the applicable law cited establishes that the declared valuation benefit of the Airfreight Rules Tariff and the Airbill inured to the benefit of the appellant, and that in any event the record fails to establish evidence that supports the Court's findings of damages.

Respectfully submitted,

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